No. 96-795

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by polling its employees about their continued support for their union when petitioner did not have a good-faith reasonable doubt as to the union's majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 83 F.3d 1483. The decision and order of the National Labor Relations Board (Pet. App. 19-27), and the decision of the administrative law judge (Pet. App. 28-64), are reported at 316 N.L.R.B. 1199.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1996. A petition for rehearing was denied on September 13, 1996. Pet. App. 66-67. The petition for a writ of certiorari was filed on November 19, 1996,

and was granted on March 3, 1997 (J.A. 65). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 9(a) of the National Labor Relations Act (Act), 29 U.S.C. 159(a), provides, in relevant part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." To enforce that guarantee, Congress enacted Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(a)(1), 29 U.S.C. 158(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is the right of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157. Congress assigned the principal authority to implement those and other provisions of the Act to the National Labor Relations Board (Board). See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

The Board has adopted, and this Court has upheld, several presumptions concerning the continued majority status of a union once it has been "designated or selected for the purposes of collective bargaining by the majority of the employees" in an appropriate bargaining unit. First, "[a] union 'usually is entitled to a conclusive presumption of majority status for one year following' Board certification as such a representative." *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1758 (1996) (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987)); see also *Curtin Matheson*, 494 U.S. at 777-778; *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 & n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). A union is entitled to the same conclusive presumption of majority status "during the term of any collective-bargaining agreement, up to three years." *Auciello Iron Works*, 116 S. Ct. at 1758; see also *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 343 n.8 (1978); *Burns*, 406 U.S. at 290 n.12. After the end of the first year following certification, or after the expiration of a collective-bargaining agreement, the presumption of a union's majority status continues, but becomes rebuttable. *Auciello Iron Works*, 116 S. Ct. at 1758; see also *Curtin Matheson*, 494 U.S. at 778; *Fall River*, 482 U.S. at 38; *Brooks*, 348 U.S. at 98.

As this Court has affirmed, these presumptions "'are based not so much on an absolute certainty that the union's majority status will not erode' * * * as on the need to achieve 'stability in collective-bargaining relationships.'" *Auciello Iron Works*, 116 S. Ct. at 1758 (quoting *Fall River*, 482 U.S. at 38). The presumptions promote such stability in two ways. First, "they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Fall River*, 482 U.S. at 38. Second, they "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*; see also *Auciello Iron Works*, 116 S. Ct. at 1758; *Brooks*, 348

U.S. at 100. "The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Fall River*, 482 U.S. at 38-39. "The rationale behind the presumptions is particularly pertinent" in the "successorship" context: where, as in this case, a "new employer is * * * a successor of the old employer and the majority of its employees were employed by its predecessor." *Id.* at 39, 41; see note 2, *infra*.

b. "Under the Board's longstanding approach," once a union's presumption of majority status becomes rebuttable, an employer may rebut that presumption by showing that "either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778. An employer with a "good-faith reasonable doubt" about the union's majority status has several options. First, under the Board's existing regulatory approach, the employer may withdraw recognition from the union unilaterally and refuse to bargain with it; in response, the union may seek an unfair-labor-practice proceeding before the Board to determine whether the employer's action was in fact bona fide and based on objective considerations sufficient to justify a reasonable doubt that the union continued to have majority support. See generally *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951); *Terrell Mach. Co.*, 173 N.L.R.B. 1480 (1969), enforced, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970); see also *Curtin Matheson*, 494 U.S. at 778; *Brooks*, 348 U.S. at 104. Second, under Section 9(c)(1)(B) of the Act, the employer may petition the

Board to conduct an election under Board supervision; such "representation" elections sought by "management" are known as "RM" elections. See 29 U.S.C. 159(c)(1)(B); *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966); see also *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 198 (1986). To obtain such an election, an employer must meet the same standard applicable to withdrawal of recognition from a union: it must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *Ibid.* (quoting *United States Gypsum*, 157 N.L.R.B. at 656).

The Board currently recognizes a third option available to an employer with a good-faith reasonable doubt about a union's majority status: an informal poll of the employees, sponsored by the employer itself, to determine their continued support for the union. The Act itself, however, does not specifically address the subject of employer polls. The issue in this case is whether the Board, in the exercise of its authority to interpret the Act's general provisions—and particularly Sections 8(a)(1), 8(a)(5), and 9(a)—has reasonably concluded that an employer violates the Act by polling its employees if, before conducting the poll, the employer lacks a good-faith reasonable doubt as to the union's majority status.

c. The Board first articulated its polling standard 23 years ago in *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974). In that case, the Board held that an employer violates Section 8(a)(5) of the Act by conducting a poll "without objective considerations casting doubt on the [union's] majority status." *Ibid.* The Board explained that, "[i]n order to minimize the interruption and impairment of a bargaining relation-

ship," and to prevent "a recalcitrant employer * * * from keeping the bargaining relationship in a recurrent state of turbulence by periodically compelling the union to reestablish its majority," the Board will not entertain an employer's election petition unless the employer can demonstrate a reasonable ground, based on objective considerations, for believing that the union has lost its majority status. *Id.* at 723-724. The Board concluded that it would be anomalous to allow an employer to conduct a poll where, because it lacks a reasonable basis for believing that the union has lost its majority status, the employer could not have secured an RM election. *Id.* at 724-725. "If the Board would not have conducted an election there is no basis for accepting the results of a private poll conducted by the employer without the advantages of impartial supervision and without the many Board safeguards designed to insure a fair election." *Id.* at 724.

The Board again addressed employer polling in *Jackson Sportswear Corp.*, 211 N.L.R.B. 891 (1974). There, the Board held that, in addition to violating Section 8(a)(5) of the Act, an employer violates Section 8(a)(1) by conducting a poll "at a time when it [does] not possess sufficient objective evidence to have entertained a reasonable doubt of the incumbent [u]nion's continuing majority status." *Id.* at 891 n.3. The Board explained that, where an employer conducts a "private 'election' in the absence of a good-faith doubt of majority and of objective considerations sufficient to warrant a reasonable and good-faith doubt," the employer impermissibly interferes with the representative status of the employees' chosen bargaining agent "at a time when, for reasons of industrial stability," the Board would not have granted

a petition for an RM election. *Id.* at 907; accord *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300, 1304 (1982) (employer poll conducted without a good-faith reasonable doubt of majority status "independently violates Section 8(a)(1), because it deprives employees of stability in their choice of a representative").

d. During the 1980s, three courts of appeals invalidated the Board's polling standard, principally on the ground that that standard is, but should not be, the same as the standard governing an employer's unilateral withdrawal of recognition from a union. In *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141 (1981), the Fifth Circuit held that, under the Board's rule, "an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." *Id.* at 1144. Instead of remanding the matter to the Board for reexamination of its regulatory scheme, the court invented and imposed a polling standard lower than the Board's, holding that, "when an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere, it may * * * poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal [of recognition])." *Id.* at 1145 (internal quotation marks and footnote omitted).

Similarly, in *Thomas Industries, Inc.* v. *NLRB*, 687 F.2d 863 (1982), the Sixth Circuit stated that, "[u]nder the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary," and, following *A.W. Thompson*, held that "an employer may poll its employees to determine their union sentiment if it has substantial,

objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Id.* at 867. Finally, in *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295 (1984), the Ninth Circuit also adopted the "loss of support" standard for polling (*id.* at 1299); it viewed the Board's standard as "tantamount to an outright prohibition of employer-sponsored polls." *Id.* at 1297.

In *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991), however, the Board addressed this judicial criticism and reaffirmed its polling standard, which (unlike the courts' standard) turns not on whether a union has suffered some degree of "loss of support," but on whether, at the time the poll was announced, the employer had a good-faith reasonable doubt that the union had retained the support of a majority of employees. The Board determined that the latter standard is more consistent with the ultimate goal of the Act—to promote industrial stability in collective-bargaining relationships—than is the less stringent "loss of support" standard. *Id.* at 1061. Polls, the Board explained, are "potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises simultaneously a challenge to the union in its role as representative and a doubt in the mind of an employee as to the union's status as his bargaining representative." *Id.* at 1061-1062. The courts' less stringent polling standard would have the effect of "expand[ing] the range of circumstances under which

employees could be subjected to such potentially disruptive polling." *Id.* at 1062.[1]

The Board acknowledged that, because the Act bars employers from negotiating with minority unions, an employer has legitimate interests "in avoiding continued recognition of an incumbent union that no longer has the support of a majority of the employees it represents and, vice versa, in avoiding withdrawal of recognition from an incumbent union that still does have such majority support." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. The Board explained, however, that the rebuttable presumption of continued majority status enjoyed by an incumbent union "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union, and it also effectively relieves an employer of any obligation it might feel to withdraw recognition from an incumbent union whose majority support is doubted by the employer." *Ibid.*

The Board emphasized that its polling standard does not abridge the right of *employees* to choose for themselves whether or not to be represented by a union for purposes of collective bargaining. No matter what the standard for *employer*-sponsored polls may

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[1] The Board added that "[i]t would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board-conducted RM election * * * while on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e., the courts' 'loss of support' standard." *Texas Petrochemicals*, 296 N.L.R.B. at 1060.

be, the Board noted, employees have the means "to rid themselves of an incumbent representative that is no longer supported by the majority" by obtaining "a decertification election upon a petition * * * supported by at least 30 percent of the unit employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1062; see 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a).

2. This case involves the lawfulness of an employer-sponsored poll conducted at a time when, in the Board's determination, the employer lacked a good-faith reasonable doubt concerning the majority status of an incumbent union. On December 5, 1990, petitioner purchased a truck sales and repair facility in Allentown, Pennsylvania, from Mack Trucks, Inc. (Mack). Since 1973, Mack had recognized Local Lodge #724, International Association of Machinists, AFL-CIO (the Union), as the exclusive representative of a bargaining unit of service department mechanics and parts department employees at the Allentown facility. Mack ceased operations at the facility on December 20; petitioner began operations there on December 21. Pet. App. 29, 30, 32. By January 1, 1991, petitioner had hired 32 employees into the bargaining unit, all of whom had been employed by Mack on the date it ceased operations. *Id.* at 39-40.

On January 2, 1991, the Union asked petitioner to recognize it as the bargaining representative of the unit employees and to begin negotiations for a contract covering those employees. Pet. App. 35. On January 25, however, petitioner rejected that request. Petitioner asserted that "[t]here is a good faith doubt as to support of the Union among the employees hired by the Company," and it informed the Union that, "[i]n order to avoid possible protracted and unproductive dispute over this issue," petitioner would arrange

for an "independent poll" of the employees in the bargaining unit on February 8. *Id.* at 43. At the poll, 13 employees cast ballots for representation by the Union, and 19 cast ballots against the Union. *Id.* at 44. Petitioner based its claim of a good-faith reasonable doubt concerning the Union's level of support on various statements made over time by employees to members of Mack's and petitioner's management. *Id.* at 9-12, 21 n.4, 22-24, 46-55; see also Pet. Br. 3-4, 35-38.

3. On March 27, 1991, acting on unfair-labor-practice charges filed by the Union, the General Counsel of the Board filed a complaint against petitioner. Pet. App. 28. An administrative law judge (ALJ) concluded that petitioner had committed an unfair labor practice by taking the poll and then, based on the results, refusing to recognize and bargain with the Union, *id.* at 28-64, and the Board agreed, *id.* at 19-27.

a. The ALJ initially concluded that petitioner was a successor employer to Mack and was therefore presumptively obligated to recognize and bargain with the Union, which enjoyed a rebuttable presumption of continued majority status in the bargaining unit after petitioner began operations. Pet. App. 32 n.4, 38-42. The ALJ then applied the Board's polling standard, which, as noted, permits an employer to conduct a poll of its employees to test an incumbent union's continued majority support only if the employer has "a good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the [u]nion before conducting the poll." *Id.* at 45 (citing *Texas Petrochemicals Corp.*, *supra*).

After examining the evidence that petitioner cited to support its reasonable-doubt claim, the ALJ found that, as of January 25, 1991, only six or seven of the 32

employees in the bargaining unit (or approximately 20% of the unit) had clearly indicated that they no longer wished to be represented by the Union. Pet. App. 52. That quantum of evidence, the ALJ concluded, was insufficient, without more, to constitute "an objective reasonable doubt of union majority support," and therefore did not justify the poll subsequently conducted by petitioner. *Id.* at 52-53. Indeed, the ALJ added, petitioner's evidence might not even have supported a poll under the less stringent "loss of support" standard adopted by the Fifth, Sixth, and Ninth Circuits. *Id.* at 53 n.7; see pp. 7-8, *supra*. The ALJ recommended that the Board order petitioner, among other things, to recognize and, upon request, bargain with the Union. Pet. App. 62-63.

b. With certain modifications not relevant here, the Board adopted the ALJ's recommended order and affirmed his findings and conclusions. Pet. App. 19-27. A majority of the Board agreed that petitioner had lacked a reasonable doubt concerning the Union's majority status when it conducted the poll, and that, under *Texas Petrochemicals*, petitioner therefore lacked authority to take the poll. *Id.* at 25-26. The Board also held, in the alternative, that petitioner's evidence was "insufficient" to meet even the "loss of support" standard. *Id.* at 26 n.9. Board Member Stephens agreed that petitioner's evidence did not satisfy that latter standard and would have affirmed the ALJ's findings on that basis alone. *Ibid.*

4. A divided panel of the court of appeals enforced the Board's order and upheld the Board's polling standard. Pet. App. 1-18. The court acknowledged that the Fifth, Sixth, and Ninth Circuits had rejected that standard, but it disagreed with the analysis of those courts. *Id.* at 4 & n.1, 8. The court observed that,

even if the other courts' "basic proposition" were correct—"that the standard for polling should be lower than the standard for withdrawal of recognition"—that proposition would not necessarily lead to the conclusion that the Board's polling standard should be relaxed. *Id.* at 6. The same objective, the court noted, could be accomplished (for example) "by raising the Board's withdrawal-of-recognition standard." *Ibid.* The court also noted that the other courts of appeals that have rejected the Board's polling standard have created a different anomaly, by "making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election." *Ibid.*

The court found this to be an area in which deference to the Board's policy decisions is appropriate, because "[n]othing in the National Labor Relations Act specifically governs [employer polling]." Pet. App. 7. Recognizing the Board's concern that polling employees about their support for an incumbent union is "potentially, if not inherently, both disruptive of the collective-bargaining relationship * * * and also unsettling to the employees involved" (*ibid.*, quoting *Texas Petrochemicals*, 296 N.L.R.B. at 1061), the court concluded that, "[i]n light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls," *ibid.* "Nothing we have seen," the court added, "justifies our disregarding the Board's choice and replacing it with a judicially-created lower standard for polling." *Id.* at 8.

Applying the Board's "reasonable doubt" standard, the court agreed with the Board that petitioner had failed to meet that standard in this case. Pet. App. 9-12. The court sustained, as supported by substantial evidence, the Board's finding that petitioner lacked a

reasonable doubt about the Union's majority status on January 25, 1991—the date on which it refused to recognize the Union and announced it would poll the employees—because, on that date, petitioner had objective reason to believe that "only 7 of the 32 employees had repudiated the [U]nion." *Id.* at 12; see *id.* at 9.

Judge Sentelle dissented. Pet. App. 13-18. He agreed with the reasoning of the courts of appeals that have disapproved the Board's polling standard, and he further suggested that the record demonstrated "overwhelming objective evidence of the loss of majority support" for the union. *Id.* at 18.

SUMMARY OF ARGUMENT

"The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1758 (1996). Employer-sponsored polling of employees to determine their continued support for an incumbent union threatens that statutory objective because it throws "the bargaining relationship in[to] a recurrent state of turbulence by periodically compelling the union to reestablish its majority." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723-724, (1974). Thus, so long as the Board permits such polls, it may reasonably limit their use to circumstances in which an employer in fact has a "good-faith reasonable doubt," based on objective evidence, concerning whether a union has the support of a majority of employees. In the absence of such a showing, the Board has reasonably relied on employees, whose interests are most directly at stake, to

decide for themselves whether to test their union's continued majority status.

Petitioner claims that the Board's polling standard is "contrary to the Act" on the theory that, in adopting that standard, the Board has exceeded the scope of its authority under Section 8(a)(1) to prohibit labor practices that "interfere with, restrain, or coerce employees" in the exercise of their collective bargaining rights. 29 U.S.C. 158(a)(1). That claim is improperly presented here, however, for two independent reasons. First, because petitioner did not raise that claim either in the court of appeals or in the petition for certiorari, and because the court of appeals did not in fact address it, this Court too should decline to consider it. Second, petitioner has not challenged the Board's independent and long-exercised authority—which the Board failed to employ in this case only because of an omission in the complaint—to base its polling standard on Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). In any event, petitioner's claim that the Board has acted beyond the scope of its authority under Section 8(a)(1) is without merit: The Board has reasonably determined that employer-sponsored polling, unjustified by an objectively reasonable doubt about an incumbent union's majority status, does in fact impair employees' collective-bargaining rights in violation of that provision.

Petitioner also contends (Br. 10) that, "[a]lthough the Board continues to cite the words of the good faith doubt" standard, "it has in practice eliminated [that standard] in favor of a strict head count" proving an actual loss of majority support; for that reason, petitioner argues, that standard, in application, renders polls "superfluous." That assertion is incorrect. The

Board's decisions make clear that an employer may well have reasonable grounds for doubting a union's majority status, and may accordingly poll its employees to test that status, even if, before conducting the poll, it does not have proof that the union has in fact lost the support of a majority of the bargaining-unit employees. In any event, petitioner's argument misses the mark: If, in particular cases, the Board has misapplied its own polling standard, the appropriate remedy is to remand such cases to the Board for reasoned application of that standard, not to invalidate the standard itself. The record in this case confirms that the Board properly applied its standard here and that petitioner did indeed lack an objective basis for doubting the majority status of the Union at the time the poll was announced.

Finally, like several courts of appeals that have addressed the issue, petitioner challenges the Board's polling standard on the related but distinct ground that the Board acted irrationally in making that standard identical to the standard governing the lawfulness of an employer's unilateral withdrawal of recognition from a union. That argument is also without merit. Because an employer can have a reasonable doubt about a union's majority status without knowing that it in fact lacks majority support, such an employer may well wish to convey its good faith to its employees, and thereby reduce the risk of litigation or a labor strike, by taking a poll to confirm the union's status before withdrawing recognition. The Board has acted reasonably both in giving employers that option and in limiting that option to the circumstances in which polls are in fact likely to reveal a loss of majority support. In any event, even if it were irrational for the Board to apply the same standard

for polls and withdrawals of recognition, the proper judicial response would be to permit the Board, on remand, to consider alternative regulatory approaches in the first instance, not, as several courts have assumed, to invent a new polling standard and impose it on the Board.

ARGUMENT

I. THE BOARD'S "REASONABLE DOUBT" STANDARD FOR DETERMINING THE LAWFULNESS OF EMPLOYER-SPONSORED POLLS IS A PERMISSIBLE EXERCISE OF THE BOARD'S AUTHORITY TO IMPLEMENT SECTIONS 8(a)(1) AND 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT

The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the workplace is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957); accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978). The Board is therefore entitled to "considerable deference" in formulating rules "to fill the interstices of the [Act's] broad statutory provisions," so long as those rules are "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; accord *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996) (Board is due "considerable deference" to "develop national labor policy through interstitial rulemaking") (internal citation omitted); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987) (similar).

The principal issue in this case is whether the Board has acted "rational[ly] and consistent[ly] with the Act" in authorizing an employer to poll its employees concerning their support for an incumbent union only if that employer has a "good-faith reasonable doubt," based on objective evidence, concerning the union's continued majority status. That issue turns on two distinct inquiries, which we address in points I(A) and I(B) respectively. First, is the Board's standard for employer-sponsored polling, taken by itself, a reasonable means of "striking th[e] balance" among competing interests "to effectuate national labor policy"? *Truck Drivers*, 353 U.S. at 96. Second, is it rational for the Board to apply the same standard for polling as it applies in judging the lawfulness of an employer's unilateral withdrawal of recognition from a union? Although, in our view, both of those questions should be answered in the affirmative, it is nonetheless important to keep them distinct. Even if the second question were properly answered in the negative, as several courts of appeals have held, the appropriate remedy would be a remand to the Board for reexamination of its regulatory scheme, not (as those courts believed) invalidation of the Board's current polling standard or the imposition of an alternative scheme developed in the first instance by the federal judiciary.

A. The Board's Standard For Employer-Sponsored Polls Is A Permissible Means Of Advancing The Act's "Overriding Goal" Of Industrial Peace

1. As this Court has held, the "overriding policy" of the National Labor Relations Act is "industrial peace," and the Board's principal duty is to advance that policy by "promot[ing] stability in collective-

bargaining relationships, without impairing the free choice of employees." *Fall River*, 482 U.S. at 38; accord *Auciello Iron Works*, 116 S. Ct. at 1758 ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees."). That is the purpose and the effect of the Board's decision to limit the use of polling in the workplace. "[P]olling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises simultaneously a challenge to the union in its role as representative and a doubt in the mind of an employee as to the union's status as his bargaining representative." *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1061-1062 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991). Moreover, polling permits "a recalcitrant employer" to "keep[] the bargaining relationship in a recurrent state of turbulence by periodically compelling the union to reestablish its majority." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723-724 (1974).[2]

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[2] This case involves a successorship, a situation in which "[t]he rationale behind the presumptions [favoring a union's continued majority support] is particularly pertinent." *Fall River*, 482 U.S. at 39. As this Court has explained, "[d]uring a transition between employers, a union is in a peculiarly vulnerable position," for "[i]t has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the

Although, in limited circumstances, the Board has long permitted employers to conduct such polls, nothing in the text of the Act requires it to do so or addresses the issue of employer-sponsored polling. Indeed, precisely because such polling often imperils the Act's "overriding policy" of "industrial peace," *Fall River*, 482 U.S. at 38, some commentators have advocated the complete elimination of polling as a method for determining whether a union has retained majority support. See, *e.g.*, Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 Wis. L. Rev. 653, 674-677, 705; see also pp. 41-42, *infra*. That course would preserve a variety of mechanisms for challenging a union's majority status: an employer would retain the option of petitioning the Board to conduct an RM election, and, as discussed below, the employees themselves—whose interests are most directly at stake—may obtain a Board-sponsored decertification election by

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new employer must bargain with it." *Ibid.* Accordingly, "during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Ibid.* Therefore, "[w]here * * * the union has a rebuttable presumption of majority status, this status continues despite the change in employers," and "the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor." *Id.* at 41; see also *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 278-279 (1972). Here, it is undisputed that petitioner, as a successor to Mack, hired its entire workforce from Mack's staff, and therefore was obligated to bargain with the Union absent a valid basis for rebutting the Union's presumption of majority status. Pet. App. 2, 20, 32 n.4, 42; see also Pet. Br. 9.

filing a petition supported by at least 30% of the unit employees. See 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a).

To date, however, the Board has adhered to its longstanding decision to "acknowledge an employer's right to conduct" such polls despite the inherent threat that they pose to industrial peace. *Texas Petrochemicals*, 296 N.L.R.B. at 1061. So long as the Board recognizes that right, however, it is entirely reasonable, and fully consistent with the purposes of the Act, for the Board to limit the use of those polls to circumstances in which their threat to workplace stability is outweighed by a strong probability that a poll will reveal that a union in fact lacks majority status: *i.e.*, circumstances in which, before taking the poll, the employer has a good-faith reasonable doubt, based on objective evidence, concerning whether a majority of employees continues to support the union.

Petitioner offers no valid basis for challenging the Board's refusal to extend an employer's authority to poll to circumstances in which the employer's evidence about union support falls short of that standard. Although petitioner suggests that a broader polling authority is necessary to ensure that employers meet their statutory duty to bargain only with unions that have majority support, Pet. Br. 27-28; see also Chamber of Commerce Amicus Br. 12 n.2, that concern is baseless. As the Board has observed, the presumption of continuing majority status, unless and until rebutted, "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union." *Texas Petrochemicals*, 296 N.L.R.B. at 1062.

Instead, in asserting principles of "employee choice" (Pet. Br. 27), petitioner seeks, at bottom, to

act "as its workers' champion" against their union. *Auciello Iron Works*, 116 S. Ct. at 1760. As this Court recently observed, however, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Ibid.* Indeed, "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to industrial peace, it is inimical to it." *Ibid.* (internal brackets omitted) (quoting *Brooks* v. *NLRB*, 348 U.S 96, 103 (1954)); see also *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 209 (1986). That employees know how to exercise their own decertification rights under the Act is shown by the fact that, in fiscal year 1995, 971 employee-sponsored decertification petitions were filed with the Board. See *Sixtieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 1995*, at 11, 121 (1996) (*60th Annual Report*).[3]

2. In addition to petitioner's argument that it is irrational for the Board to apply the same "reasonable

[3] There is no merit to petitioner's assertion (Br. 29-30 & n.21) that a decertification petition "can easily be blocked by the filing of even meritless unfair labor practice charges." See also *id.* at 15 n.14. Under the Board's "blocking charge" rule, the filing of certain types of unfair-labor-practice charges, such as a charge alleging an unlawful withdrawal of recognition, will ordinarily halt the processing of an election petition, but only if, after an investigation, the Board determines that the charge has merit. *NLRB Casehandling Manual (Part Two), Representation Proceedings* § 11730.3 (Sept. 1989); see *NLRB* v. *Big Three Indus., Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). If a charge is meritless, the Board makes that determination promptly and dismisses it. See *60th Annual Report* 9 (median time from filing of charge to issuance of complaint was 60 days during fiscal year 1995).

doubt" standard to employer-sponsored polling that it applies to withdrawals of recognition—a claim that we address in point I(B) below—petitioner challenges the substance of that standard itself on two principal grounds. First, petitioner claims that any standard conditioning an employer's authority to poll its employees on a reasonable doubt about the union's majority status is "contrary to the Act"; petitioner suggests that Section 8(a)(1), 29 U.S.C. 158(a)(1), which makes it an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their collective-bargaining rights, provides no statutory basis for regulating employer-sponsored polls. Second, petitioner contends that the polling standard that the Board applies is in fact stricter than the standard that it professes: that, in practice, the Board "require[s] proof, via a head count," that a majority of employees do not support the union (Pet. Br. 33); and that this covert standard is inherently irrational because it requires an employer to "obtain[] so much evidence of no majority support as to render the poll superfluous" (*id.* at i). We address each of those contentions in turn.

a. Petitioner argues (Br. 22-24) that the Board's polling standard "is contrary to the Act" because, in petitioner's view, a poll conducted in conformity with the Board's procedural guidelines (as petitioner claims was the case here)[4] cannot impair collective-

[4] Under *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), and its progeny, the Board requires an employer to communicate the purpose of its poll to its employees, to assure those employees against reprisals, and to conduct the poll by secret ballot; and the Board also conditions an employer's authority to take a poll on a showing that the employer has not engaged in unfair labor practices or otherwise created a coer-

bargaining rights in violation of Section 8(a)(1), which, petitioner correctly notes, was the sole statutory basis upon which the Board found the poll in this case to be unlawful. See also Chamber of Commerce Amicus Br. 20-22. For two separate reasons, that claim is not properly before this Court; and, in any event, it is without merit.

First, although petitioner has raised a number of challenges to the rationality of the Board's polling standard, neither in the court of appeals nor in its petition for certiorari did petitioner claim that the Board had acted beyond the scope of its statutory authority in setting substantive limits on the circumstances in which an employer may conduct polls of its employees. Indeed, that claim appears inconsistent with the central theme of the petition: that the Act requires the Board to adopt the lower polling standard (see pp. 7-8, *supra*) created by the Fifth, Sixth, and Ninth Circuits. See Pet. 10-11; Reply Br. 2-5.[5] In contrast, petitioner's new claim would appear

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cive atmosphere. Subsequently, in *Texas Petrochemicals*, the Board held that employers seeking to poll their employees concerning their continued support for an incumbent union must also give the union "reasonable advance notice of the time and place of the poll." 296 N.L.R.B. at 1061. Petitioner is incorrect in asserting that the Board found that its poll "complied with the *Struksnes* and *Texas Petrochemicals* procedural guidelines." Br. 23. Rather, having concluded that petitioner did not meet the "reasonable doubt" polling standard, the Board declined to decide whether the poll was conducted in conformity with the Board's procedural guidelines; in particular, the Board found it "unnecessary to decide whether * * * [petitioner] provided the Union sufficient advance notice of the poll." Pet. App. 26 n.9.

[5] Petitioner argued in the court of appeals that the Board is required to adopt that lower standard and that its poll satisfied that standard. See Pet. C.A. Opening Br. 17 ("The Court of Appeals standard, rather than the NLRB standard, is correct."); Pet. C.A. Reply Br. 7 ("The NLRB made no real effort to consider the evidence under the courts' standard. Properly considered, there was a reasonable basis for doubting the Union's support.").

to foreclose subjecting employer-sponsored polling to any substantive standards at all. Because that claim was neither made to nor passed on by the court of appeals, and because it was not presented in the petition, this Court should decline to consider it. See, *e.g.*, *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1402 n.7 (1996); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also Sup. Ct. R. 24.1(a).

Second, even if petitioner had properly preserved this new claim, this case would be an inappropriate vehicle for resolving it, as we would have noted in opposing the petition for certiorari if the claim had appeared there. In past cases, the Board has based its "reasonable doubt" polling requirement not just on its authority to implement Section 8(a)(1) of the Act, but also—and often principally—on its independent authority under Section 8(a)(5), 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." See pp. 5-7, *supra*; *e.g.*, *Texas Petrochemicals*, 296 N.L.R.B. at 1058. Neither petitioner nor its amici (see, *e.g.*, Chamber of Commerce Amicus Br. 20-22) claim that the Board's polling standard is beyond the scope of its authority to implement Section 8(a)(5). Instead, petitioner observes (Br. 22) that, in this particular case, the Board found only that petitioner's poll violated Section 8(a)(1), rather than both Section 8(a)(1) and (5). That

peculiarity of the Board's holding, however, is the result of a failure by the Board's General Counsel to allege a violation of Section 8(a)(5) in the complaint. See Pet. App. 26 n.9. Thus, even if petitioner's Section 8(a)(1) claim had merit, which it does not, that claim would not affect the Board's separate authority under Section 8(a)(5) to proscribe conduct by an employer that independently constitutes a "refus[al] to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5).

In any event, Section 8(a)(1) does in fact authorize the Board to adopt rules limiting the circumstances in which an employer may poll its employees about their continued support for a union. As noted, that provision makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their collective-bargaining rights under the Act. 29 U.S.C. 158(a)(1). To permit every employer, once a union's majority status becomes rebuttable, to poll its employees whenever it chooses, and without any independent evidence of employee dissatisfaction with the union, would in fact seriously "interfere with" and "restrain" the collective-bargaining rights that Section 7 of the Act, 29 U.S.C. 157, guarantees to employees.[6]

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[6] Amicus Chamber of Commerce also suggests that the Board has acted "*ultra vires*" in imposing substantive limits on employer-sponsored polling. See Br. 20-22. To the extent, however, that the Chamber recognizes the Board's authority to impose such limits in individual cases but nonetheless contends that the Board is powerless to rely on its experience in labor-management relations to generalize about the kinds of employer practices that impair employees' collective-bargaining rights (see *ibid.*), that argument is without merit. See generally *Auciello Iron Works*, 116 S. Ct. at 1759 (Board acted reasonably in relying on its expertise to formulate "bright-line rule" governing unfair labor practices and foreclosing need for "case-by-case determinations"). To the extent that the Chamber makes the separate point that the Board has forbidden "*any* poll conducted before an employer knows the outcome" (Br. 20), that contention is simply incorrect, as discussed below (see pp. 29-35).

Employer-sponsored polling threatens to throw "the bargaining relationship in[to] a recurrent state of turbulence by periodically compelling the union to reestablish its majority," *Montgomery Ward*, 210 N.L.R.B. at 723-724; moreover, polling suggests to employees that the employer is anxious to withdraw recognition from the union and deal with them directly and individually, rather than collectively. See *Texas Petrochemicals*, 296 N.L.R.B. at 1061-1062. Thus, the broad polling rights proposed by petitioner would require the union to "divert[] its attention and resources from representing the workers to defending itself," *Peoples Gas Sys., Inc.* v. *NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980), and the union might thus be "tempted to make unreasonable demands in order to retain the allegiance of the employees," *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300, 1305 (1982) (quoting *United States Gypsum Co.*, 157 N.L.R.B. 652, 655 (1966)). Because a union cannot effectively represent employees under such unstable circumstances, petitioner's approach would frustrate the statutory right of employees to engage in collective bargaining. For those reasons, among others, even the courts that have deemed the Board's "reasonable doubt" standard too strict have tacitly acknowledged the Board's statutory authority to protect employees' collective-bargaining interests by limiting the circumstances in which employers may conduct such

polls, including polls that satisfy the Board's procedural standards. See *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981); *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863, 869 (6th Cir. 1982); *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1299 (9th Cir. 1984).

Finally, citing the Board's greater willingness to permit employer-sponsored polling where a union is engaged in an initial organizing campaign, see generally *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967), petitioner also contends (Br. 23) that the Board's limitation on the circumstances in which an employer may poll employees about their support for an *incumbent* union unlawfully distinguishes between "polls in which unions stand to gain and polls in which they stand to lose." That argument is without merit, however, because it seeks to "make situations that are different appear the same." *Brooks* v. *NLRB*, 348 U.S. 96, 104 (1954). In an initial organizing situation, it is unclear whether a majority of the employees have selected the union as their representative, and a poll, with procedural safeguards, is a reasonable means of ensuring that the employer will not violate Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by voluntarily recognizing a union which has never been selected by a majority of the employees. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). In an incumbent union situation, by contrast, the union *has* been selected by the employees as their exclusive bargaining representative under Section 9(a), 29 U.S.C. 159(a), and, because of the statutory policy of encouraging stability in established bargaining relationships, the union enjoys a

presumption of continuing majority status. See pp. 2-4, *supra*.[7]

b. Petitioner's remaining challenge to the inherent reasonableness of the Board's polling standard is its argument (Br. 10) that, "[a]lthough the Board continues to cite the words of the good faith doubt" standard, "it has in practice eliminated [that standard] in favor of a strict head count" confirming an actual loss of majority support. See also *id.* at 32-33; Chamber of Commerce Amicus Br. 10, 11, 20; Labor Policy Ass'n Amicus Br. 7. That assertion, which leads petitioner to conclude that the Board permits polling only where an employer "has obtained so much evidence of no majority support as to render the poll superfluous" (Br. i), is incorrect; in any event, even if the assertion had merit, it would not support the remedy that petitioner seeks here.

This Court recently recognized that, as between the two alternative methods for rebutting the presumption favoring an incumbent union's continuing majority status (see p. 4, *supra*), "the substantiation required to make [a] showing" that a union "in fact lack[s] majority support" is, as the Board has long intended, "greater than that required to assert a good-faith doubt" sufficient to justify either a poll or a withdrawal of recognition. *Auciello Iron Works*, 116 S. Ct. at 1757 n.2. For that proposition the Court cited *Curtin Matheson*, in which it had rejected the

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[7] Contrary to the contention of amicus Chamber of Commerce (see Br. 23), the Board's limitation on polling does not raise "serious * * * questions" under either the First Amendment or Section 8(c) of the Act, 29 U.S.C. 158(c). Neither of those provisions entitles an employer to engage in labor practices that violate Section 8(a)(1) or (5). See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

contention that the Board has "*sub silentio* * * * forsaken the good-faith doubt standard" in the replacement-worker context by requiring "some objective evidence indicating the replacements' opposition to the union." 494 U.S. at 788 n.8. The Court further observed in *Curtin Matheson* that, "[t]o show a good-faith doubt, an employer *may rely on circumstantial evidence*," whereas "to show an actual lack of majority support, * * * the employer must make a numerical showing that a majority of employees in fact oppose the union." *Ibid.* (emphasis added) (citing *Stormor, Inc.*, 268 N.L.R.B. 860, 866-867 (1984)); accord *Auciello Iron Works, Inc.*, 317 N.L.R.B. 364, 365 n.14, 368, enforced, 60 F.3d 24 (1st Cir. 1995), aff'd, 116 S. Ct. 1754 (1996).

The Board itself recently reaffirmed that it "has never imposed a requirement that there be proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit in order for an employer to establish good faith doubt." *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995) (internal quotation marks and citation omitted), enforced, 101 F.3d 691 (3d Cir. 1996) (Table). As the Board explained, "[t]he most persuasive evidence, of course, would consist of expressed, unsolicited indications from the majority of unit employees that they do not wish the union to represent them," but "[m]ost cases * * * are not so straightforward." *Id.* at 319. Accordingly, "[i]n the absence of direct indications of union nonsupport from a majority of employees, the employer may rely on statements or actions of nonsupport from less than a majority of employees, combined with circumstantial evidence which may indicate a loss of majority support for the union." *Ibid.*

As the Board's opinion in *Liquid Carriers* makes clear, a "head count"—"direct indications of union nonsupport from a majority of employees"—is simply unnecessary, for purposes of either polling or withdrawal of recognition, to substantiate an employer's reasonable basis for believing that a majority of the employees no longer wishes to be represented by the incumbent union. A broad variety of prior Board decisions—holding, often in light of probative circumstantial evidence, that an employer had successfully made the necessary showing—supports that same conclusion.[8] Similarly, the Board has relied upon the

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[8] See, *e.g.*, *J&J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1163 n.1, 1171 (1984) (withdrawal of recognition lawful where only 6 of 32 employees were members of union, and union steward told employer that the employees were not interested in the union); *Stormor, Inc.*, 268 N.L.R.B. 860, 867 (1984) (withdrawal of recognition lawful where 20% of non-striking employees told employer that they and other groups of non-strikers did not want union representation, and non-strikers crossed picket line over a period of several months despite sustained strike violence); *U-Save Food Warehouse*, 271 N.L.R.B. 710, 716-718 (1984) (withdrawal of recognition lawful based on employee statements, a foreman's report based on conversations with employees, and an employee's refusal to sign an authorization card); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 (1983) (withdrawal of recognition lawful based on plant manager's testimony that every employee except union steward opposed union, which included conversations with a number of specific individuals, and was corroborated by a proliferation of anti-union signs in the plant and by employees' hostility toward union steward); *I T Servs.*, 263 N.L.R.B. 1183, 1183 n.1, 1188 (1982) (withdrawal of recognition lawful where striker replacements, who constituted a majority of the unit, knew that union was seeking their discharge; a supervisor had spoken to almost all of the replacements, who told him they did not want union representation; and picketers had directed "massive" violence

existence of a good-faith reasonable doubt as to a union's majority status as a complete defense to an unlawful withdrawal-of-recognition charge, even if the union in fact actually enjoyed majority support when the employer withdrew recognition. See *AMBAC Int'l, Ltd.*, 299 N.L.R.B. 505, 506 (1990); *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 398 (1976), petition for review denied, 575 F.2d 1045 (2d Cir. 1978).

In arguing that the Board has "silently abandoned" the good-faith reasonable doubt standard, and instead

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toward replacements); *Independent Ass'n of Steel Fabricators, Inc.*, 252 N.L.R.B. 922, 923, 932-933 (1980) (order regarding S. Cervenka and Sons, Inc.) (withdrawal of recognition lawful where, although employees went on strike, none picketed employer, and three of four asked employer to sign contract with another union), enforced *sub nom. NLRB* v. *Koenig Iron Works, Inc.*, 681 F.2d 130 (2d Cir. 1982); *Upper Mississippi Towing Corp.*, 246 N.L.R.B. 262, 262-264 (1979) (withdrawal of recognition lawful where union representative admitted to employer's attorney that union would be unable to win an election); *Naylor, Type & Mats*, 233 N.L.R.B. 105, 107-108 (1977) (withdrawal of recognition lawful where employees made statements to management about their own union sympathies, union failed to bargain for one of job classifications in unit, and employees (not employer) took "head counts" of coworkers and reported results to management); *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 397-398 (1976) (withdrawal of recognition lawful where striking unions requested negotiations for new agreements, without any expression or claim of support among the strikers, after period of months during which time unions had made no effort to police their contracts), petition for review denied, 575 F.2d 1045 (2d Cir. 1978); *White Castle Sys., Inc.*, 224 N.L.R.B. 1089, 1092 (1976) (poll lawful where union had processed only one grievance in ten years, there were no union stewards, union representatives made statements during bargaining from which it could be inferred that the union lacked majority support, and majority of employees had expressed dissatisfaction with union).

requires "proof, via a head count," that the union has actually lost majority status (Pet. Br. 32-33), petitioner relies (see *id.* at 10 & n.8, 11) upon the Board decisions cited by the Chief Justice in his separate opinion in *Curtin Matheson*. There, the Chief Justice observed that "some recent decisions suggest that [the Board] now requires an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status." 494 U.S. at 797 (Rehnquist, C.J., concurring); see also *id.* at 799-800 & n.3 (Blackmun, J., dissenting). In each of the decisions in question, however, the Board focused on expressions of anti-union sentiment attributable to specific employees only because, in those particular cases, that was the primary nature of the evidence offered by the employers to support their claims of good-faith reasonable doubt. To the extent that those employers also relied on circumstantial evidence, the Board held not that such evidence is irrelevant, but that the specific circumstantial evidence offered in those cases was insufficient to support a good-faith reasonable doubt concerning the union's majority status.[9] In sum, the Board decisions upon which peti-

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[9] Thus, in *Johns-Manville Sales Corp.*, 289 N.L.R.B. 358 (1988), enforcement denied, 906 F.2d 1428 (10th Cir. 1990), the employer introduced, among other things, a decertification petition signed by a substantial number (but less than a majority) of the employees, and comments repudiating the union by a few identified employees. *Id.* at 361. The Board accepted that evidence as relevant to, but not dispositive of, a good-faith reasonable doubt about the union's continued majority status. *Ibid.* The Board also considered circumstantial evidence proffered by the employer, but found that it was insufficient to buttress the employer's good-faith doubt claim; for example, the

tioner relies are fully consistent with the Board's recent reaffirmation of its long-standing policy not to require "proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit in order for an employer to establish good faith doubt." *Liquid Carriers*, 319 N.L.R.B. at 319 n.10 (citation and internal quotation marks omitted).

In any event, even if petitioner were correct in claiming that, in particular decisions, the Board has departed "*sub silentio*" from its own polling standard, the appropriate remedy for any such departure would

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Board declined to "speculate" about the union sentiments of certain employees, who had attended mandatory company meetings at which employees had asked the employer how to "get rid of" the union, "solely on the basis of their attendance at the meetings." *Id.* at 362. In *Tube Craft, Inc.*, 289 N.L.R.B. 862 (1988), the employer introduced direct evidence about the anti-union sentiments of particular striker replacements, but the Board found that that evidence was insufficient to support a good-faith reasonable doubt as to the union's continued majority status. *Id.* at 870-872. In *Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. 769 (1987), enforced *sub nom. U.S. Mosaic Tile Co.* v. *NLRB*, 935 F.2d 1249 (11th Cir. 1991), cert. denied, 502 U.S. 1031 (1992), the employer relied on anti-union petitions signed by substantially less than one-third of the employees in the bargaining unit. *Id.* at 783-784. Petitioner also relies (Br. 10 n.8) on two cases not cited by the Chief Justice in his concurring opinion in *Curtin Matheson*; in those cases, too, the employer proffered primarily evidence about the union sentiments of particular employees. See *Alcon Fabricators*, 317 N.L.R.B. 1088, 1090-1091 (1995) (employee remarks to management), vacated and remanded, No. 96-5231, 1997 WL 234618 (6th Cir. May 6, 1997); *Phoenix Pipe & Tube*, 302 N.L.R.B. 122, 122-123 (employee remarks to management and an employee petition requesting "the right to vote for or against a union shop"), enforced, 955 F.2d 852 (3d Cir. 1991).

not be invalidation of the standard itself, but a remand to the Board for a reasoned reapplication of that standard in any individual case in which the standard has been misapplied. See, *e.g.*, *Bio-Tech Corp.* v. *NLRB*, 105 F.3d 890, 896-897 (3d Cir. 1997); *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141, 153-154 (3d Cir. 1994); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). As discussed in point II below, this is not such a case. To the extent that petitioner invokes the related but distinct concern that practical considerations can sometimes make it difficult for employers to *have* a good-faith reasonable doubt about a union's majority status without taking a poll, cf. *Curtin Matheson*, 494 U.S. at 799-800 & n.3 (Blackmun, J., dissenting), that is a permissible consequence of the Board's policy decision to promote industrial stability by relying principally on employees (rather than on their employers) to determine whether and how they wish to engage in collective bargaining. As this Court recently reaffirmed, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Auciello Iron Works*, 116 S. Ct. at 1760; see pp. 20-22, *supra*.

B. The Board's Polling Standard Is Consistent With Other Aspects Of Its Regulatory Scheme

As discussed above, petitioner's challenges to the substantive validity of the "reasonable doubt" standard are without merit: that standard is consistent with the Act and is a reasonable means of advancing the Act's "overriding policy" of "industrial peace."

See *Fall River*, 482 U.S. at 38. Petitioner separately challenges, however, the consistency of that standard with other aspects of the Board's regulatory scheme. In particular, petitioner contends (see, *e.g.*, Br. 25) that it is irrational for the Board to require the same showing—a good-faith reasonable doubt about a union's continued majority status—to justify an employer-sponsored poll as to justify an employer's unilateral withdrawal of recognition from a union. That contention is incorrect; and, even if it were correct, the proper remedy would not be invalidation of the polling standard itself, as petitioner suggests, but a remand to the Board for reexamination of its regulatory scheme as a whole.

1. Because, as we have discussed, an employer can establish a good-faith reasonable doubt as to a union's majority status without proof that the union has in fact lost the support of a majority of the bargaining-unit employees, an employer-sponsored poll can serve a valuable purpose even if the standards for polling and unilateral withdrawal of recognition are the same. As the Board has explained, while an employer with "a reasonable doubt about the union's continued majority * * * could, on the strength of that doubt, withdraw recognition, there still remains an inherent uncertainty about whether the union has *actually* lost its majority support." *Texas Petrochemicals*, 296 N.L.R.B. at 1063. Thus, rather than "simply withdraw recognition from a union that might still in fact have majority support, an employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." *Ibid.*

Petitioner contends (Br. 31) that, so long as the standards for polling and withdrawal of recognition

are the same, an employer nonetheless "has nothing to gain from taking [a] poll" because the poll results can justify a subsequent withdrawal of recognition only if the poll was itself valid, see *Texas Petrochemicals*, 296 N.L.R.B. at 1064; thus, petitioner suggests, an employer can never ease its ultimate evidentiary burden for justifying a withdrawal of recognition by first taking a poll. To be sure, that the standards for polling and withdrawal of recognition are identical does mean that polling has little utility for an employer that *lacks* a "good-faith reasonable doubt" about a union's continued majority status but is nonetheless determined to withdraw recognition from the union in any event. "The same need for repose" (*Auciello Iron Works*, 116 S. Ct. at 1758) that led the Board to limit polling to cases in which an employer actually has a reasonable doubt concerning majority status has also led the Board, in a determination that petitioner does not directly challenge, to enforce that policy by barring an employer *without* such a doubt from conducting a poll anyway and then using the result as a post-hoc justification for having done so. See *Texas Petrochemicals*, 296 N.L.R.B. at 1064; see also Pet. App. 27 & n.11.

By contrast, an employer that *does* have "a reasonable doubt about a union's continued majority," but that nonetheless faces "uncertainty about whether the union has *actually* lost its majority support," *Texas Petrochemicals*, 296 N.L.R.B. at 1063, might well wish to conduct a poll to resolve that uncertainty before unilaterally withdrawing recognition from a union. That is so even though, in those circumstances, the same "reasonable doubt" standard would shield the employer from liability for withdrawing recognition if it is later determined that a majority of

employees actually did support the union. See, *e.g.*, *AMBAC Int'l*, 299 N.L.R.B. at 506; *Arkay Packaging*, 227 N.L.R.B. at 398.[10] Many employers acting in good faith—and wishing to convey that good faith to their employees—would not wish to withdraw recognition from a union unless they could first confirm whether or not that union in fact lacks majority support; polling is one method of making that determination. For that reason, even though the standards governing the legality of the two courses of action are the same, there are often "sound business reasons" for taking a poll before withdrawing recognition: "The employer may wish to resolve the representational issue more quickly, or reduce the risk of a [post-withdrawal-of-recognition] strike, or minimize damage to the collective-bargaining relationship and demonstrate good faith to its employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1063.

It is true that the Board's "reasonable doubt" standard is sufficiently rigorous and fact-specific that employers often cannot be certain in advance whether their evidentiary basis either for taking a poll or for withdrawing recognition will ultimately be deemed to have met that standard. But some degree of indeterminacy in this context is inevitable, and petitioner cites no basis for believing that the "loss of support" standard favored by some courts would be any more determinate, or any less likely to lead to litigation, than the Board's standard. In any event, the fact-

[10] Similarly, if the union loses the poll and the employer withdraws recognition based on the poll results, the employer can defeat an unfair-labor-practice claim simply by showing that, before the poll, it had a good-faith reasonable doubt regarding the union's majority (and not necessarily proof of an actual loss of majority support).

specific character of the Board's polling standard provides no basis for requiring that standard to be different from the standard for withdrawals of recognition.[11]

2. Even if it were "irrational" for the Board to apply the same standard for polling as for withdrawals of recognition, which it is not, the proper judicial remedy would be to remand this case to the Board for reconsideration of its regulatory scheme in the first instance, not to bar the use of that standard in the polling context or to invent an entirely new standard and impose it on the Board. See *South Prairie Constr. Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976) (per curiam); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). Thus, in prescribing a specific policy solution for the "anomaly" that they perceived in the Board's regulatory scheme, the courts of appeals that have adopted a "loss of support" standard to replace the Board's own standard (see pp. 7-8, *supra*) "did not give 'due observance [to] the distribution of authority made by Congress as between

[11] Indeed, that fact-specific character underscores the continued utility of polling even though those standards are the same. For example, if a poll reveals a wholesale lack of support for a union and the employer thereafter withdraws recognition, the union would be less inclined to challenge the employer's evidentiary basis for conducting the poll than it would have been to challenge the employer's evidentiary basis for withdrawal of recognition in the absence of a poll, and the union would also be less likely to call a post-withdrawal strike. See *Texas Petrochemicals*, 296 N.L.R.B. at 1063. Similarly, where a poll reveals continued majority support for a union, the employer will know not to withdraw recognition, and the prevailing union will be quite unlikely to challenge the poll as an unfair labor practice.

its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.'" *South Prairie Constr.*, 425 U.S. at 806 (quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)).

The need to respect that "distribution of authority" is particularly acute in this case because, if this Court were to require different standards for polling and withdrawal of recognition, the Board would then need to choose among a variety of alternative approaches for promoting the policy objectives of the Act. Specifically, invalidation of the Board's existing approach would not require adoption of a lower polling standard like the one invented and imposed by the Fifth, Sixth, and Ninth Circuits.[12] As the court of appeals in this case observed (see Pet. App. 8), the Board could also reasonably choose, for example, to "impose a more stringent evidentiary standard on employers who withdraw recognition without having the results of a poll or an RM election" or to "set a higher standard for withdrawals of recognition and a lower standard for RM elections."

Indeed, the Board's General Counsel has argued that the Board should relax the standards for both polling and RM elections but abrogate the policy permitting employers to withdraw recognition from a union upon a showing of a "good-faith doubt" concerning the union's majority status. See General Counsel's Exceptions and Brief at 8-13, *Chelsea Indus., Inc.*, No. 7-CA-36846 *et al*; cf. *Curtin Matheson*, 494 U.S. at 788 n.8.[13] Another commentator has argued that the

[12] Indeed, as the Board has explained, the approach adopted by those courts would itself create a true anomaly: it would "require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board conducted RM election," but permit "that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e. the courts' 'loss of support' standard." *Texas Petrochemicals*, 296 N.L.R.B. at 1060. Petitioner counters (Br. 25) that the same standard that applies to Board elections should not apply to employer-sponsored polls, because, "while a poll and a Board-conducted election are similar in purpose, *they are not similar in consequences*." While it is true, as petitioner observes (*ibid.*), that an election, but not a poll, generally precludes the holding of another election in the same bargaining unit for one year (see 29 U.S.C. 159(c)(3)), an election and a poll nonetheless share "the same serious potential consequences for the union and the employees" because "[t]he purpose of RM elections and employer polls is to determine whether an incumbent union still has majority support," and "their potential consequence * * * is loss of recognition and standing as collective-bargaining representative for the union, and loss of representation for the employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1060. In light of the common legal and practical consequences shared by elections and polls, it is reasonable for the Board to conclude that the standard for polling should be no lower than that for a Board election—even if other options would also be reasonable for the Board to adopt.

[13] Upon the filing of our opposition to the petition for certiorari, we lodged a copy of the General Counsel's brief with this Court and served a copy on petitioner. As of the date of this filing, the Board has not yet decided *Chelsea Industries*. The Board declined to adopt a similar proposal in *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1158 (1996), petition for review and cross-application for enforcement pending, No. 96-1362 (D.C. Cir., argued May 14, 1997), for reasons unrelated to the proposal's merits. See 153 L.R.R.M. (BNA) at 1161 n.14 ("As the parties and amici were not notified that this issue would be a subject for consideration by the Board, we decline to address it at this time.").

Board should lower its standard for conducting RM elections but abolish both polling and unilateral withdrawals of recognition. See Flynn, *supra*, 1991 Wis. L. Rev. at 705. Although the Board has endorsed neither of those approaches, each would remain a possible option if this Court were to invalidate the Board's present regulatory scheme as internally inconsistent.

II. THE BOARD REASONABLY CONCLUDED THAT PETITIONER LACKED SUFFICIENT EVIDENCE OF A LOSS OF MAJORITY SUPPORT, PRIOR TO CONDUCTING ITS POLL, TO SATISFY THE BOARD'S REASONABLE-DOUBT STANDARD

Applying its reasonable-doubt standard to the facts of this case, the Board found that petitioner's poll was an unfair labor practice because, when the poll was announced, petitioner lacked a reasonable basis for believing that a majority of the employees in the bargaining unit no longer wished to be represented by the Union. Pet. App. 20-21, 26 n.9. The court of appeals upheld that finding as supported by substantial evidence. *Id.* at 9-12. Petitioner offers no basis for doubting the correctness of either the Board's disposition or the court of appeals' review of that factbound inquiry—a matter that would not ordinarily warrant further review by this Court, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

1. The Board found that, as of January 25, 1991, the date on which petitioner informed the Union that it had decided to poll the employees, petitioner had no objective basis for believing that any more than six or

seven[14] out of the 32 employees in the bargaining unit—*i.e.*, 20% of the workforce—opposed union representation. Pet. App. 20-21, 26 n.9. The Board reasonably concluded that that showing, without more, was inadequate to support a good-faith reasonable doubt that a majority of employees opposed the Union. Petitioner does not contend otherwise. Rather, petitioner's principal argument (Br. 35-36) is that the Board should have accepted, as *further* evidence of the Union's alleged loss of support, a statement made to management by Ronald Mohr, a Union shop steward,[15] that, "with a new company, if a vote was taken, the Union would lose," and that it was "his feeling that the employees did not want a union." See Pet. App. 53; J.A. 25, 38-39. The Board reasonably discounted the significance of that statement.

First, the Board accepted (Pet. App. 23-24) the ALJ's finding (*id.* at 55) that Mohr's assertion was

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[14] These were employees Rusty Hoffman, Joe McKilvie, Tim Frank, Scott Murphy, Kermit Bloch, David Baker, and Milt Solt, each of whom had made statements repudiating the Union. Pet. App. 50-52 & n.6.

[15] The Board and the courts have long recognized that a generalized assertion, in which one employee purports to speak for others, does not normally constitute reliable evidence about those employees' support for the union. See, *e.g.*, *Bryan Memorial Hosp.* v. *NLRB*, 814 F.2d 1259, 1262 (8th Cir.), cert. denied, 484 U.S. 849 (1987); *NLRB* v. *Cornell of California, Inc.*, 577 F.2d 513, 516-517 (9th Cir. 1978); *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 & n.11 (1989); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n.10 (1983). Nonetheless, such evidence may sometimes be deemed reliable where the individual who purports to speak for his co-workers is a steward or other union official. See, *e.g.*, *J&J Drainage Prods. Co.*, 269 N.L.R.B. at 1171; *Upper Mississippi Towing Corp.*, 246 N.L.R.B. at 263-264; *Universal Life Ins. Co.*, 169 N.L.R.B. 1118, 1119 (1968).

"almost off-the-cuff [in] nature," and there was "no evidence with respect to how he gained this knowledge." Second, the Board noted (*id.* at 24) that Mohr was a steward for the service department employees, but not for the parts department employees, and thus he "had no more basis than any other employee for reporting the union sentiments of employees in the parts department." Third, the Board found (*id.* at 23-24), as had the ALJ (*id.* at 53-55), that Mohr made his remark to management before it began interviewing employees in December 1990, and that he therefore must have been referring to the Union's level of support among Mack's complement of employees, not among petitioner's smaller complement of employees.

Petitioner asserts (Br. 35-36) that it was "illogical" for the Board to discount Mohr's remark on the ground that he was referring to the union sympathies of Mack's employees, not petitioner's employees. But petitioner does not now challenge (cf. *id.* at 36 n.26) the ALJ's principal finding, upheld by the Board, that Mohr's remark was "almost off-the-cuff [in] nature" and bereft of any discernible factual basis. That finding was an adequate and independent basis for the decision to discount the remark's significance. As the court of appeals noted (Pet. App. 12), such remarks do not bear "sufficient indicia of reliability" to permit an employer to rely upon them as probative evidence of the union sentiments of its workforce.

Petitioner suggests (Br. 36) that the Board's treatment of Mohr's remark is inconsistent with its prior decisions in *American Mirror Co.*, 277 N.L.R.B. 1626 (1986), and *Naylor, Type & Mats*, 233 N.L.R.B. 105 (1977). Those cases, however, are far afield from this one. As the court of appeals noted (Pet. App. 12), in those cases "the information the employer received

about other employees was, unlike the information the company relied on here, specific and detailed." Thus, as the Board observed in its decision here (*id.* at 24 n.8), the employer in *Naylor, Type & Mats* acted reasonably in relying on the testimony of two employees concerning the union sentiments of their co-workers because those employees had identified specific employees who supported or opposed the union. See 233 N.L.R.B. at 108. Mohr's statement bore no such indicia of reliability. Similarly, in *American Mirror*, the Board found that the employer reasonably relied on a series of reports by employees to management that the union no longer enjoyed majority support: the employer had received four separate such reports, each of which corroborated the other; at least one of the reports specified the employees who were said to oppose union representation; and the reports were consistent with signed statements received by the employer from a substantial number of employees. See 277 N.L.R.B. at 1626 & n.5. No similar evidence corroborated Mohr's remark in this case.

2. Petitioner also contends (Br. 39) that the Board attributed too little probative value to the fact that Kermit Bloch, a night-shift employee, told management that "the entire night shift," consisting of five or six employees, "did not want the Union." See Pet. App. 51; J.A. 48-49. As the ALJ explained (Pet. App. 51-52), however, because neither Bloch nor any of the other night-shift employees testified, it is unknown "how he formed his opinion about the views of his fellow employees," and "[t]here is no showing that they made independent representations about their union sympathies." In those circumstances, the Board—upheld by the court of appeals (*id.* at 11-12)—reason-

ably concluded that petitioner could rely on Bloch's statement only to the extent that it reflected his own lack of continued support for the Union. *Id.* at 52.

3. Finally, petitioner challenges (Br. 37-38) the Board's treatment of separate statements made to management by four other employees—Mike Ridgick, Dennis Wehr, Randy Zoltack, and Dennis Marsh—concerning their own individual union sentiments (not those of their co-workers). In each case, the Board's decision to discount the statement at issue was reasonable.

In 1986, Ridgick had asked Robert Dwyer, Mack's branch manager and petitioner's future president, about the process for decertifying a union. Pet. App. 47 & n.5; J.A. 33-34. The Board reasonably concluded that, because Ridgick had posed that question in 1986, it was too remote in time to bear on his union sentiments in January 1991. Pet App. 48; see *Manna Pro Partners, L.P.* v. *NLRB*, 986 F.2d 1346, 1353 (10th Cir. 1993). Indeed, there is no evidence that Ridgick took any action to decertify the Union after his 1986 inquiry. Petitioner asserts (Br. 37) that Ridgick's anti-Union sentiment in 1986 was "consistent" with his position, expressed during his job interview with petitioner in December 1990, that, "as long as the new company would treat them [*i.e.*, the employees] right, there was no need for a Union." See Pet. App. 48; J.A. 56. Even on its face, that remark was not a repudiation of the Union—unions are formed precisely because employees fear that management will not "treat them right"—and, in any event, the Board reasonably concluded that Ridgick's interview remark was non-probative because he made it only after the interviewer, representing petitioner, had told him that "the new company would be non-union." Pet. App. 21

n.4, 47; J.A. 63-64. As the court of appeals explained (Pet. App. 10), "[s]uch employee expressions are unlikely to be sincere." See *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 9 (1st Cir. 1978).[16]

Employee Marsh stated during his job interview with petitioner that he was "not being represented for the $35 he was paying" in dues. Pet. App. 50; J.A. 57. The Board reasonably concluded (Pet. App. 51) that, because Marsh's comment was "more an expression of desire for better representation than one for no representation at all," it was not a valid basis for believing that he no longer supported the Union. See, *e.g.*, *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332, 335-336 (9th Cir. 1995). Similarly, employee Zoltack told management in February 1991 that "the Union was a waste of $35." Pet. App. 51; J.A. 57. Not only was that statement, like Marsh's, reasonably understood as a complaint about the quality of the Union's representation rather than a rejection of the Union, but, in addition, Zoltack made the statement after petitioner had already decided to conduct the poll on January 25, and thus "his feelings could not have been part of [petitioner's] good-faith doubt as of that date." Pet. App. 51.[17]

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[16] Petitioner misstates the record in suggesting (Br. 37) that the Board discounted Ridgick's December 1990 interview statement on the ground that "Ridgick was a manager (interviewing for a bargaining unit job), as if that automatically meant that Ridgick was insincere." Rather, the ALJ simply noted, in his overall discussion of the issue, that, "[a]s Ridgick was a member of management at the time he made the statement, I would find it hard to believe that he would express any prounion sentiment during the job interview." Pet. App. 48.

[17] There is no merit to petitioner's suggestion (Br. 37 n.28) that it was arbitrary for the Board to treat January 25, 1991, as

Finally, employee Wehr told Mack branch manager Dwyer in July 1990 that, if the latter were elected a principal of a new company, "we didn't have to have a union." Pet. App. 49; J.A. 24. The Board, upheld by the court of appeals (Pet. App. 9), reasonably concluded that petitioner could not rely on Wehr's statement because, although it had hired Wehr in December 1990, he quit on January 23, 1991, and thus was not in the bargaining unit on January 25, 1991, the date on which petitioner informed the Union that it had decided to poll the employees. *Id.* at 49-50; J.A. 35-36.

In sum, the Board acted reasonably in concluding that, at the time the poll was announced, petitioner lacked a good-faith reasonable doubt, based on objective considerations, concerning whether a majority of its employees continued to support the Union. Indeed, in our view, the Board was also correct in determining, in the alternative, that petitioner's basis for conducting that poll was insufficient even to satisfy the "loss of support" standard created by the Fifth, Sixth, and Ninth Circuits. See Pet. App. 26 n.9.

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the relevant date for determining whether petitioner had a legal basis for deciding to poll the employees. As the court of appeals observed (Pet. App. 9), January 25 was the date as of which petitioner "had already decided to take the poll." Accordingly, it was reasonable for the Board, in assessing petitioner's claim of a good-faith reasonable doubt, to disregard the alleged union sympathies of employees who were not employed by petitioner on that date.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1997